

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEREK HUSTON¹,

Defendant-Appellant.

UNPUBLISHED

September 11, 2001

No. 217595

Wayne Circuit Court

LC No. 98-007126

ON REMAND

Before: Doctoroff, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

This case is before this Court for the second time. In *People v Huston*, unpublished per curiam opinion of the Court of Appeals, issued February 20, 2001 (Docket No. 217595), we reversed defendant's conviction and remanded for a new trial, holding that the trial court erred in admitting impermissible drug profile evidence. In response to the prosecutor's application for leave to appeal, our Supreme Court vacated our opinion and remanded the case for reconsideration of whether the claimed error was adequately preserved and for review pursuant to either *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999) or *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). *People v Huston*, 627 NW2d 602 (2001). Upon reconsideration, we conclude that the issue whether drug profile evidence was improperly admitted was not preserved and did not constitute plain error requiring reversal. See *Carines, supra*. Accordingly, we reverse our prior decision and, after review of defendant's remaining issues on appeal, affirm defendant's conviction.

On appeal, defendant argued that drug profile evidence was improperly admitted as substantive evidence of guilt. However, to preserve an evidentiary issue for appeal, a party must assert a timely objection, specifying the same ground for challenge as the party asserts on appeal. See MRE 103(a)(1); *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). In this case, although defendant objected during the admission of some of the drug profile evidence, such objections were lacking in the specificity required to permit review under the harmless error standard. Therefore, we must review this issue for plain error. *Carines, supra* at 766-767.

¹ Defendant's name is Aaron Safford but the alias he gave police at the time of his arrest is used in the case caption. Mr. Huston, defendant's cousin, is not involved in this case.

To establish plain error, the error must have occurred, been plain, and affected defendant's substantial rights, i.e., was prejudicial. *Id.* at 763-764, citing *United States v Olano*, 507 US 725, 731-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993). However, even if the requirements are met, reversal is warranted only when the plain error resulted in the conviction of an innocent defendant or when such error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763.

In this case, the drug profile evidence, in particular the repeated reference to the location of defendant's arrest as a "known narcotics area," was improperly admitted. See *People v Murray*, 234 Mich App 46, 63; 593 NW2d 690 (1999); *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995). That defendant was arrested in a location known for narcotic activity cannot reasonably be construed as assisting the jury to understand the evidence presented in this case or to prove identity through *modus operandi*. See *Murray, supra* at 56. Rather, the prosecutor's repeated reference to defendant being arrested in an area known for narcotic activity in both his opening and closing arguments, as well as his practice of eliciting the same information from the three police officers involved in defendant's arrest, appears to have been a studied attempt to link this innocuous drug profile characteristic directly to defendant as substantive evidence of his guilt. See *Id.* at 63.

Although we are troubled by the prosecutor's conduct, we conclude that the admission of the improper drug profile evidence did not constitute plain error requiring reversal. Defendant failed to establish the requisite prejudice resulting from the plain error in light of the untainted evidence in support of his conviction. Although the circumstantial evidence tending to prove that defendant possessed and intended to deliver less than fifty grams of cocaine was not overwhelming, we cannot conclude that the court's error affected the outcome of the trial. Further, had defendant met his burden of persuasion regarding prejudice we would decline to reverse because we are not persuaded that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Carines, supra* at 763. Accordingly, this claim of error was forfeited and we must consider the other issues defendant raised on appeal.

Defendant also argues that the evidence was insufficient to establish that he possessed and intended to deliver the cocaine. We disagree. As discussed above, when the evidence is viewed in a light most favorable to the prosecutor, it was sufficient for the jury to conclude beyond a reasonable doubt that defendant was guilty, under a theory of aiding and abetting, of the charged offense. See *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

Next, defendant argues that the trial court abused its discretion in allowing evidence that defendant used an alias when he was arrested. We disagree. The prosecutor's witnesses knew defendant by his alias; therefore, such testimony was necessary to identify that defendant was the person being referenced by the witnesses. See *People v Griffis*, 218 Mich App 95, 99; 553 NW2d 642 (1996), quoting *People v Pointer*, 133 Mich App 313, 316; 349 NW2d 174 (1984).

Next, defendant claims he was denied a fair trial because of two instructional errors. We disagree. Defendant failed to object to the jury instructions; therefore, this issue is forfeited unless defendant demonstrates plain error requiring reversal. See *Carines, supra* at 764; *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000).

First, defendant argues that the instruction regarding constructive possession was inadequate and allowed the jury to convict him on the basis of mere association. Second, defendant argues that the concept of reasonable doubt was not properly conveyed to the jury because it did not contain the “moral certainty” language. However, defendant has failed to establish plain error warranting reversal. Read in their entirety, the jury instructions properly informed the jury of the applicable law and adequately protected defendant’s rights. See *Id.* at 420-421; *People v Head*, 211 Mich App 205, 210-211; 535 NW2d 563 (1995).

Finally, we reject defendant’s argument that the cumulative effect of trial errors deprived him a fair trial because none of defendant’s claims of error are meritorious. See *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter